The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Nebraska Aluminum Castings, Inc.--Claim

File: B-222476.6, B-222476.7

Date: September 15, 1987

DIGEST

Claim for monetary damages arising from rejection of bid as nonresponsive is denied where General Accounting Office (GAO) previously denied the protest and affirms prior positions that agency's actions leading to the bid rejection and GAO and agency reliance on recent GAO decisions, was not improper or based on bias.

DECISION

Nebraska Aluminum Castings, Inc. (NAC), claims $118,525 for protest, bid preparation and other costs under 31 U.S.C. § 3702 (1982), resulting from the Department of the Army's rejection of its bid as materially unbalanced under invitation for bids (IFB) No. DAAK01-85-B-B060. Previously, pursuant to our Competition in Contracting Act (CICA) bid protest function (31 U.S.C. § 3551(1) (Supp. III 1985)), we issued three decisions and two letters sustaining the Army's action and denying NAC's claim for protest and bid preparation costs. Nebraska Aluminum Castings, Inc., B-222476, June 24, 1986, 86-1 CPD ¶ 582, aff'd on reconsideration, B-222476.2, Sept. 23, 1986, 86-2 CPD ¶ 335, B-222476.3, Nov. 4, 1986, 86-2 CPD ¶ 515, letter to NAC, B-222476.4, Nov. 25, 1986, letter to Senator J. James Exon, B-222476.5, Dec. 23, 1986. We deny the claim.

In previously denying NAC's protest and claim for costs, we applied the CICA mandate that we must determine that a solicitation, proposed award, or award of a contract does not comply with statute or regulation before such costs may be granted. Since our prior decisions were adverse to NAC, in that we found no violation of statute or regulation concerning the rejection of NAC's bid and the award to the incumbent, there was no basis to allow recovery of the claimed costs. NAC and the Army have debated the possible exclusivity of our CICA claims authority over our general claims settlement authority under which the claim is filed.

However, since we continue to find no basis to object to the Army's rejection of the bid, we see no need to discuss this matter. NAC itself acknowledges that the requisite showing for relief under 31 U.S.C. § 3702 is no less stringent than under CICA.

Briefly, the facts concerning this procurement are the following. After the low bidder under the IFB was determined to be nonresponsible, the Army also found NAC, the next low bidder, to be nonresponsible due to its lack of experience in producing the required item. Because of NAC's status as a small business concern, the matter was referred to the Small Business Administration (SBA) for a certificate of competency (COC) determination. The SBA determined that NAC was a responsible prospective contractor to perform the work and advised the Army that it would issue a COC to NAC unless the Army chose to appeal the determination. Shortly before the appeal period expired, the Army rejected NAC's bid as nonresponsive on the ground that it was materially unbalanced with respect to the firm's first-article pricing.

In the first decision, we concluded that the Army had properly rejected NAC's bid as materially unbalanced because the firm's first-article prices were grossly inflated ($22,510 for each of 10 first-article units versus $19.17 per production unit). This action reflected our holdings in the earlier decisions upon which the Army had relied. Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 C.P.D. ¶ 630; Riverport Industries, Inc., 64 Comp. Gen. 441 (1985), 85-1 C.P.D. ¶ 364, aff'd on reconsideration, B-218656.2, July 31, 1985, 85-2 C.P.D. ¶ 108. In those decisions, we held that a bidding scheme which grossly front loads first-article prices as a means to obtain unauthorized contract financing renders the bid materially unbalanced, per se, so as to require its rejection as nonresponsive. The rationale is that an award to a firm submitting grossly inflated first-article prices will provide funds to the firm early in the contract performance period to which it is not entitled if payment is to be measured on the basis of the actual value of the first-articles (i.e., the legitimate costs associated with the production and testing of the articles for acceptability); therefore, this situation presents the same evils as a prohibited advance payment. See Riverport Industries,Inc.--Request for Reconsideration, supra.

Much of NAC's present claim is based upon arguments that have been considered and reconsidered several times; therefore, we will limit our discussion to those issues which we believe directly bear on the arguments advanced to support the claim. NAC now contends that the claim should be allowed based on a prejudicial government course of

conduct which prevented the fair and honest consideration of its bid. NAC points out that the agency's actions showed that the agency never seriously intended to award to any firm other than the incumbent. NAC says that, in bad faith, the agency disqualified the NAC bid by neglecting to give due notice of the unbalanced bid rule in the solicitation, by retroactively applying the Riverport rule, and by giving preferential treatment to the awardee in ignoring a similar bid defect and in granting an improper bid extension. Furthermore, NAC alleges that prior to submitting its bid it received advice from the legal office at the procuring activity to the effect that its pricing of the bid was proper as the agency was only interested in the total price for the units. NAC accuses our Office of contributing to this course of conduct by unreasonably acquiescing in the retroactive application of our two decisions upon which the agency found NAC nonresponsive.

NAC accuses the Army of bad faith in issuing the IFB without a clear warning to bidders that a bid in the form of NAC's would be rejected as nonresponsive and the fact that the agency relied on a new General Accounting Office rule, announced in the Riverport decisions, issued just prior to the IFB.

The initial Riverport decision was issued on April 1, 1985, almost 5 months prior to the issuance of this IFB on August 27, 1985. The Army requested reconsideration of the decision, and the decision was affirmed on July 31, 1985, about 1 month prior to the IFB's issuance. The Edgewater decision, issued 3 months after the IFB and about 4 months prior to the nonresponsive bid determination, recommended that the Army take steps to discourage this type of bidding. (In 1986, the Army formally implemented the decisions by issuing guidance to its contracting activities for use of an appropriate solicitation clause.)

We held in those two decisions that the absence of a warning clause did not justify ignoring the nonresponsiveness of the unbalanced bid. Thus, the Army could not validly distinguish our decisions requiring the rejection as nonresponsive of a front-end loaded bid, like NAC's, and give NAC preferential treatment. While the incumbent awardee's bid was also unbalanced, but to a much lesser degree (compared to NAC's bid of $22,510 each ($1,222.41 each)), we did not apply the Riverport rule since we assumed that no first-articles would be required from an incumbent contractor. The incumbent was in fact awarded the contract without being required to furnish a first-article. The Army conduct evidences the proper application of our decisions, and hardly demonstrates bias or bad faith.

As for the possible misleading pre-bid agency legal advice that front-end loading a first-article price was proper, we have already twice concluded that NAC had no basis upon which to rely on such advice given the solicitation's admonition that such advice was not binding. In this connection, we note that early in the procurement NAC wrote a letter to the contracting officer requesting advice on unbalancing and the contracting officer responded in writing that NAC should seek advice from its legal counsel. Further, it is not clear who at the agency provided the last minute advice, how the question was posed by NAC or what knowledge this person had of unbalancing rules, including the Riverport decisions. In these circumstances, NAC relied at its risk on the advice it sought and received.

In further support of its argument of bias, NAC notes that the Army, before rejecting NAC's bid as nonresponsive, attempted to deny NAC an award on the basis that NAC was nonresponsible and that the Army only rejected NAC as nonresponsive when it appeared that the SBA would issue a COC. NAC stresses that the agency had no basis to find it nonresponsible based, in part, on the urgency of the procurement, but so found merely as a pretext to deprive NAC of the award. According to NAC, the Defense Contract Administration Services Management area, Cedar Rapids, was misled concerning the urgency of the procurement by a possibly biased Army technical specialist related to a former procuring activity contracting officer, who is now a sales representative for the incumbent. The Army stands by its statement that urgency was involved and advises that the technical specialist was not related to the former contracting officer. The agency justification for the nonresponsibility finding was based on NAC's lack of experience in producing the item which is a valid concern in such matters. We find nothing in the record showing that agency personnel questioned NAC's responsibility based on anything other than, as the agency states, "an honest opinion."

NAC also attempts to show bias by the fact that the agency did not raise responsiveness until "late in the game" after SBA issued the COC just prior to the appeal period expiration and 6 months after opening, despite several prior indications that the NAC bid was responsive. For a similar situation, see Islip Transformer & Metal Co., Inc., B-225257, Mar. 23, 1987, 87-1 C.P.D. ¶ 327. The last minute determination of nonresponsiveness appears to have resulted not from any bias toward NAC, but from the procuring activity's lack of awareness of the Riverport and Edgewater decisions. At the time of the contracting officer's decision, the Army had not yet disseminated guidance on the Riverport rule. The contracting officer was advised of the

rule upon forwarding the COC appeal to the Assistant Secretary of the Army for Research, Development, and Acquisition. While the contracting officer was on constructive notice of the Riverport rule and, therefore, initially should have rejected the NAC bid as nonresponsive, when he actually obtained knowledge of our prior decisions, he was required to apply them to NAC's bid. As we have often said, an agency will not be faulted for taking the proper action, even if it initially did so for an unsupportable reason.

The final argument is that we improperly applied the Riverport-Edgewater rule against NAC alone, out of context and retroactively. NAC points out that we did not enforce the rule against the bidders in those cases.

In both Riverport and Edgewater award had been made and we concluded that the unbalanced bids properly should have been rejected. In view of the circumstances involved in those cases, we did not recommend termination of the contracts. Here the agency properly applied the rule of those cases and rejected NAC's unbalanced bid. Therefore, we fail to see any uneven application of the rule of Riverport and Edgewater. We have continued to apply the Riverport rule. In Islip Transformer & Metal Co., Inc., supra, and Microtech, Inc., B-225892, Apr. 29, 1987, 87-1 C.P.D. ¶ 453, we denied protests against rejections of low bids unbalanced similarly to NAC's. In those cases, the protesters were found nonresponsive after SBA actually issued a COC following the agencies' findings of nonresponsibility.

The claim is denied.

for Harry R. Van Cleve
Comptroller General
of the United States